In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 948

JAMES W. KINDELAN AND MARY KINDELAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's opinion (R. 213–226)[1] is reported at 233 F. Supp. 557. The *per curiam* opinion of the court of appeals (Pet. A1) is reported at 351 F. 2d 310.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1965. A petition for rehearing was denied on November 4, 1965. The petition for a writ of

[1] "R." references are to the mimeographed record in the court of appeals.

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certiorari was filed on January 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

QUESTION PRESENTED

Whether a country club using municipally-owned recreational facilities can constitute a "social, athletic, or sporting club or organization" under Section 4241 (a) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 4241. IMPOSITION OF TAX.[3]

(a) *Rate.*—There is hereby imposed—

(1) *Dues or membership fees.*—A tax equivalent to 20 percent of any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $10 per year.

* * * * *

(b) *By Whom Paid.*—Except as provided in section 4243(b), the taxes imposed by this section shall be paid by the person paying such dues or fees, * * *.

[26 U.S.C. 4241.]

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[2] Petitioners (Pet. 2) mistakenly base jurisdiction on 28 U.S.C. 2101(c), which governs the time for filing a petition for a writ of certiorari.

[3] This tax has been repealed as of January 1, 1966, by the Excise Tax Reduction Act of 1965, P.L. 89-44, 79 Stat. 136, §§ 301, 701.

STATEMENT

Petitioners, residents of Miami Shores Village, paid to the Miami Shores Country Club an annual golf and pool fee of $200 for each of the years 1959, 1960, and 1961. The Commissioner determined that the payments were dues or membership fees subject to the 20 percent excise imposed by Section 4241(a) of the 1954 Code. Petitioners paid taxes and interest of $138.60, and brought this suit for refund.

The Village owned and operated the country club facilities, which included a golf course, swimming pool, tennis courts, and a club house with a dining room, locker rooms and two bars (R. 214–215). Residents of the Village and approved nonresidents who, like petitioners, paid annual dues were permitted to use the country club facilities without further charge and became members of the Miami Shores Country Club Association.[4] The Association, a non-profit organization, elected the Board of Committees and the chairmen of the various operational sub-committees which were technically advisory in character, but which substantially controlled the country club except in fiscal matters (R. 215–217, 222–223, 224; see R. 218–219).

[4] The sports facilities were also available to Village residents who were not members of the Association if they paid an annual charge of $10 and an additional fee each time they used a particular facility. However, signs on the premises gave notice that certain areas were restricted to annual dues-paying members (R. 223–224).

The district court found that the country club was a social and sporting club or organization, and concluded that the regular dues paid by petitioners were properly subjected to the excise tax for the years involved (see R. 224–226). The court of appeals affirmed *per curiam* (Pet. A 1).

ARGUMENT

The decision of the court of appeals is correct and is, moreover, of little future importance in view of Congress' repeal of the governing statute (see footnote 3, *supra*). There is no conflict or other circumstance warranting further review.

Petitioners argue that, since the facilities were owned and operated by the Village rather than by the members, the country club cannot be considered a "club or organization" within the meaning of Section 4241(a) of the 1954 Code. That and similar contentions have been uniformly rejected by the courts of appeals and the Court of Claims. *United States* v. *Howe,* 349 F. 2d 483 (C.A. 9); *Scott* v. *United States,* 300 F. 2d 141 (C.A. 6); *United States* v. *Anderson,* 108 F. 2d 475 (C.A. 7); *Munn* v. *Bowers,* 47 F. 2d 204 (C.A. 2), certiorari denied, 283 U.S. 845; *McCaughn* v. *Williams,* 23 F. 2d 840 (C.A. 3), certiorari denied, 276 U.S. 629; *Bunker Hill Country Club* v. *United States,* 9 F. Supp. 52 (Ct. Cl.), motion for new trial denied, 10 F. Supp. 159, certiorari denied, 296 U.S. 583.

The excise is levied upon the privilege of membership in a particular type of organization, regardless of who owns the facilities of the organization. *E.g.*, *Scott* v. *United States, supra,* at 143–144; *Munn* v. *Bowers, supra,* at 205. Ownership of property, frequently a consequence of club membership, is not a condition or prerequisite thereto. *United States* v. *Howe, supra,* at 489; *United States* v. *Anderson, supra,* at 479. Although the term "club" would not ordinarily encompass municipally-owned parks which are open to the general public, the nonprofit Miami Shores Country Club was sufficiently controlled by its restricted membership (through the Board of Committees and its subcommittees) to bring it within the statute.[5] Miami Shores also exhibited other indicia of a private country club (R. 223–225). See Rev. Rul. 63–3, 1963–1 Cum. Bull. 258. In any event, the question whether Miami Shores was a club

[5] Petitioners rely (Pet. 10) on a letter ruling of October 19, 1943, in which it was held that (R. 192–193) "Miami Shores Golf Club does not qualify as a social, athletic, or sporting club or organization, within the meaning of Section 1710 of the Internal Revenue Code [of 1939], and that the dues and fees paid by the members are not subject to tax." As the district court pointed out (R. 225), the situation at Miami Shores was not the same in the years in question as it was in 1943 and thus "reliance upon the * * * determination letter * * * is of no avail." See Treasury Regulations on Facilities and Services Excise Tax (1954 Code), § 49.4241–1(e) (26 C.F.R., § 49.4241–1(e)). The golf course and facilities had been open to the general public until 1946 (R. 215). Thereafter, restrictions on membership changed the character of the organization (R. 225).

is essentially factual (*Downtown Club of Dallas* v. *United States*, 240 F. 2d 159 (C.A. 5)), and there is no occasion to reexamine the concurrent findings of the two courts below.[6]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Recognizing that *Scott* v. *United States*, 300 F. 2d 141 (C.A. 6), reached precisely the same result as the court below, petitioners nevertheless assert that there is a "direct conflict in spirit between the two decisions" (Pet. 7). The Sixth Circuit in *Scott*—after holding that the district court had overstated the extent of the city's participation—held that the members ran the club, as distinguished from the facilities, through a board composed of seven elected representatives and one municipal representative, and held the dues subject to tax (300 F. 2d at 143–144). In the instant case, all of those who sat on the Board of Committees were elected by the club members. The two decisions are not inconsistent.

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